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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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**Apollo Security International, Inc.**

**Opposer**

**v.**

**Apollo Investigations, Inc.**

**Applicant.**

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**Opposition No. 91212820  
Serial No. 85897079**

**In re Application Serial No.:           85897079**

**For the Mark:                               “Apollo Investigations, Inc.”**

**Filed:                                       April 5, 2013**

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**OPPOSERS’ TRIAL BRIEF**

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## **I. INTRODUCTION**

For 25 years, opposer Apollo Security International, Inc. (“Apollo” or “the Opposer”) has been in the business of security and security-related services, private investigations and investigative services. Apollo is the owner of several federally registered trademarks associated with these services. Opposer’s first mark, Apollo Security, was registered with the U.S. Patent and Trademark Office (USPTO) in April 2001; five (5) additional marks were registered by Apollo between 2002 and 2013. Apollo offers its services and uses its registered trademarks throughout the country and internationally. As a result of its long-standing use of these marks, as well as its marketing, advertising and general promotion of its services, the marks owned by Apollo are well-recognized in the industry and are known by those seeking to purchase investigative and security services.

On or about April 5, 2013, the applicant Apollo Investigations, Inc. (“Apollo Investigations” or “the Applicant”) filed an application with the USPTO, seeking to register the mark, “Apollo Investigations, Inc.,” for, among other things, private investigations (the “Application”). The Application was assigned Serial No. 85/897079 and published in the Trademark Official Gazette on or about September 24, 2013.

On October 4, 2013, Apollo filed its Notice of Opposition. In its Notice, Apollo cited its six Registered Marks (described below). Opposer asserted each of the following reasons for the USPTO to refuse the Application for registration:

- The services provided by the Applicant and the Opposer are related because they both concern investigative services and are both in Class 45. Opposer’s security services (also in Class 45) are closely related to, and often associated with, investigative services.
- The Applicant’s proposed mark so closely resembles the Registered Marks as to be likely to cause confusion or mistake, or to deceive users of investigative and security services.



- The services to be offered by Applicant under the proposed mark may be offered to the same or related class of consumers as under the Registered Marks.
- The Applicant's proposed mark is very similar to the Registered Marks with respect to the sound, appearance, meaning, connotation and commercial impression.
- If registered, the Applicant's proposed mark would create confusion and lead customers to falsely believe that they are purchasing goods endorsed by, sponsored by or affiliated with the Opposer. If registered, the Applicant's proposed mark would also cause confusion and mistake among the Opposer's existing and potential customers as to whether the Opposer is the source of services marketed under Applicant's proposed mark.
- The confusion, mistake and/or deception resulting from registration of Applicant's mark would do irreparable damage to the Opposer and its valuable goodwill.
- Finally, registration of the proposed mark should be refused because Applicant's specimen, a piece of letterhead (copy attached to Opposition as Exhibit A), shows use of the alleged mark as a trade name only and does not show use as a mark in connection with the offering of the services listed in Applicant's application.

## **II. DESCRIPTION OF THE RECORD**

The evidence of record consists of the following:

### **A. Written Testimony**

- Direct Testimony and Declaration of Dennis M. Crowley, III, together with Exhibits A – BB, dated October 9, 2014 ("First Crowley Decl.") The Crowley Exhibits include a printout of information from the electronic database of the USPTO records for Apollo's registrations (U.S. Reg. nos. 4373338, 4373337, 4309978, 2554862, 2446292 and 4471527);
- Direct Testimony and Declaration of Michael S. Youlen, dated January 7, 2015 ("Youlen Decl.");<sup>1</sup> and
- Rebuttal Testimony and Declaration of Dennis M. Crowley, III, dated March 20, 2015 ("Second Crowley Decl.").

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<sup>1</sup> Together with this Trial Brief, Opposer has submitted Evidentiary Objections in which it seeks to strike the Youlen Declaration, in whole or in part.

B. Application Files and Pleadings

- Pursuant to 37 C.F.R. § 2.122(b), the files of the trademark applications in connection with the Registered Marks, and the Applicant's proposed mark, and the pleadings in this *Inter Partes* proceeding are deemed to be of record.

**III. OBJECTIONS TO APPLICANT'S EVIDENCE**

Pursuant to Trademark Rules 2.122 and 2.123 and the Federal Rules of Evidence, attached hereto as Appendix A is a statement of Apollo's Evidentiary Objections to the testimony and exhibits offered by Applicant.

**IV. RECITATION OF FACTS**

A. Apollo and the Registered Marks

Apollo Security, Inc. was organized as a corporation under the laws of the Commonwealth of Massachusetts in September, 1990. (First Crowley Decl., ¶2) In February, 2012, Opposer changed its name to Apollo Security International, Inc., which was a reflection of the Opposer's expanding operations and presence. (Id., ¶¶6, 24)

Over the past twenty-five (25) years, Apollo's scope of operations has expanded greatly. Presently, it offers services, either directly or through contractual arrangements, throughout the United States and internationally. (Id., ¶19) In 1998, Apollo became licensed in, and opened a branch office in Connecticut. In or about June 2001, Apollo registered to do business in the State of New York and it opened a branch affiliate office in New York City. In 2003, Apollo opened a branch office in Rhode Island. In 2004, Apollo opened a branch office in Philadelphia, Pennsylvania. In 2005, Apollo was licensed to do business in New Jersey. In 2012, Apollo expanded into Tennessee, opening branch offices in Memphis and in Nashville and it also opened a branch office in Buffalo, New York. In January 2013, Apollo opened a

branch office in Minneapolis, Minnesota. In June 2014, Apollo expanded into Wisconsin, Iowa and Ohio. (Id., ¶¶9 – 16)

In addition to these jurisdictions, Apollo currently offers various of its services in New Hampshire, Maryland, Virginia,<sup>2</sup> Indiana and internationally. Apollo currently has licenses pending in Texas and California. Apollo is also authorized to operate in Colorado, Missouri, Kentucky, Arkansas, and Mississippi, states which do not require specific licenses to provide security or investigative services. (Id., ¶17)

As noted, Apollo is authorized to do business in Virginia and it maintains a consulting office in Fairfax, Virginia. (Id.) Notably, Virginia is one of the two states in which the Applicant operates. (Youlen Decl., ¶4) While Apollo's Virginia office was established in connection with Apollo's security consulting services, Apollo has submitted an application, which is currently pending, for a license to provide services in Virginia on a direct basis, without the need to subcontract. (Second Crowley Decl., ¶8) In the other state where Applicant operates, i.e., Maryland, Apollo has an affiliate that is licensed to provide investigative services under Maryland state license number 106-3472.<sup>3</sup> (Id., ¶7)


Apollo's annual sales for services offered in connection with the Registered Marks exceeded \$40 million in 2010; \$50 million annually in each of 2011 and 2012; and \$60 million in 2013. (First Crowley Decl., ¶18) Apollo has approximately 150 customers at present and approximately 2,000 employees and contractors working for it. (Id., ¶29) Past and present customers include, among many others, Boston Scientific Corp., Putnam Investments, Shriner's Hospital for Children, Stamford Hospital, Fidelity Investments, GTE, Jordan Marsh, Data General, and Chadwick's of Boston. (Id., ¶27)

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<sup>2</sup> Applicant has stated that its business is focused primarily in Virginia and Maryland. (Youlen Decl., ¶4)

<sup>3</sup> In those states where Apollo is not directly licensed to provide investigative services, it contracts with licensed investigators to provide those services. (Second Crowley Decl., ¶6)

Apollo is the owner of six trademarks registered with the USPTO (collectively, the “Registered Marks”). The marks, listed dates of first use<sup>4</sup>, dates of filing and dates of registration are set forth below:

MARK	APP. DATE	REG. DATE	REG. NO.	DATE OF FIRST USE
	Mar. 28, 2012	Jul. 23, 2013	4,373,338	<p>Class 41</p> <p>Date of First Use: Sep. 1, 2012</p> <p>In Commence: Sep. 1, 2012</p> <p>Class 45</p> <p>Date of First Use: Sep. 1, 2012</p> <p>In Commence: Sep. 1, 2012</p>
<b>APOLLO SECURITY INTERNATIONAL</b>	Mar. 28, 2012	Jan. 21, 2014	4,471,527	<p>Class 41</p> <p>Date of First Use: Sep. 10, 2012</p> <p>In Commence: Sep. 10, 2012</p> <p>Class 45</p> <p>Date of First Use: Sep. 10, 2012</p> <p>In Commence: Sep. 10, 2012</p>
<b>A APOLLO INTERNATIONAL</b>	Mar. 28, 2012	Jul. 23, 2013	4,373,337	<p>Class 41</p> <p>Date of First Use: Sep. 1, 2012</p>

<sup>4</sup> Apollo’s use in commerce was as least as early as the listed dates. Apollo reserves the right to demonstrate earlier dates in use in commerce if material.

MARK	APP. DATE	REG. DATE	REG. NO.	DATE OF FIRST USE
				<p>In Commence: Sep. 1, 2012</p> <p>Class 45</p> <p>Date of First Use: Sep. 1, 2012</p> <p>In Commence: Sep. 1, 2012</p>
<b>APOLLO INTERNATIONAL</b>	Nov. 9, 2011	Mar. 26, 2013	4,309,978	<p>Class 41</p> <p>Date of First Use: Sep. 10, 2012</p> <p>In Commence: Sep. 10, 2012</p> <p>Class 45</p> <p>Date of First Use: Sep. 10, 2012</p> <p>In Commence: Sep. 10, 2012</p>
 <b>APOLLO SECURITY</b>	Mar. 17, 2000	Apr. 2, 2002	2,554,862	<p>Date of First Use: Sep. 13, 1990</p> <p>In Commence: 1991</p>
<b>APOLLO SECURITY</b>	Mar. 17, 2000	Apr. 24, 2001	2,446,292	<p>Date of First Use: Sep. 13, 1990</p> <p>In Commence: 1991</p>

(Id., ¶3) Copies of the registrations of the Registered Marks, as printed from the trademark electronic search system (TESS), are attached to the First Crowley Decl. as Exhibits A – F.

B. The Services Offered by Apollo

Apollo's business includes, among other things: (i) security and security-related services and (ii) private investigations and investigative services, including, but not limited to, detailed investigative reports for individuals and businesses, investigations for vetting of local personnel, investigation services involving infringement of intellectual property rights, investigations for clients traveling or opening overseas offices, investigations for asset protection and various other private investigation services. (Id., ¶4)

Apollo has been offering investigation services since at least October of 1991. At that time, it was issued a license to operate as a private detective by the Department of Public Safety, Commonwealth of Massachusetts. (Id., ¶5; *see* Exhibit G to First Crowley Decl.).

Apollo offers and markets its investigative services to all members of the public, including both businesses and individuals. (Second Crowley Decl., ¶4) Apollo does not limit its investigative services to existing clients of its security services. (Id., ¶¶2, 3)

C. The Sales, Advertising and Promotion by Apollo of its Investigative (and Other) Services

Apollo has promoted its investigative services since the company's inception. For example, when it was first issued a private detective license in Massachusetts, Apollo advertised this fact through an announcement mailed to clients and other members of the public. (First Crowley Decl., ¶5; *see* Exhibit H to First Crowley Decl.). From the early 1990's, Apollo has promoted its investigative services as an exhibitor at industry trade shows. (Id., ¶7; *see* Exhibit J to First Crowley Decl.)

On January 29, 1999, Apollo registered the domain name, apollosecurity.com, with an official registrar, Network Solutions, LLC. The registration was updated on or about September 5, 2012. (Id., ¶20) Apollo has used, and continues to use one or more of the Registered Marks to promote its services on its website, and it also uses the Registered Marks on social media sites, including Facebook and LinkedIn. (Id., ¶19) During each of 2011, 2012 and 2013, Apollo's advertising expenditures were in excess of \$50,000 per year. (Id., ¶18)

Over many years (and at least since October 2000), Apollo has advertised a broad range of investigative, due diligence and security services to members of the general public, including on its website.<sup>5</sup> (Id., ¶21) Apollo's "Mission," as described on an archived web page from February 28, 2004 is as follows: "to develop and implement solutions to security related problems for a select client base and to deliver our services with the highest degree of professionalism and integrity." (Id., ¶22; *see* Exhibit L to First Crowley Decl.)

Since at least 2004, if not earlier, Apollo's website described its Investigative Services as follows: "Apollo offers its clients a wide range of investigative services as a means of dealing with specific asset protection issues such as trademark violations, product diversion, product counterfeiting, trade secrets theft, employee theft, workplace drug abuse, time theft, fraud, and other similar threats to the assets of the corporation or institution." (Id., ¶23; *see* Exhibits M, R to First Crowley Decl.) As further described on its website, Apollo "offer[s] customized security expertise and investigative services at all locations." "Today, Apollo provides uniformed services across the United States, and investigative, consulting and executive protection services globally." (Id., ¶26; *see* Exhibit V to First Crowley Decl.)

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<sup>5</sup> Examples of archived web pages from Apollo's website from the following dates are attached to the First Crowley Decl. as Exhibits K – T, respectively: 10/17/2000, 2/28/2004, 4/2/2004, 5/29/2004, 2/21/2005, 12/13/2005, 10/26/2006, 10/12/2007, 9/6/2009 and 1/28/2010. (Id., ¶21)

A brochure which describes the scope of services presently offered by Apollo and which is used by Apollo to promote its services is attached to the First Crowley Decl. as Exhibit U. As described therein, “Apollo offers clients a wide range of investigative, consulting and executive protection services.”

Due to the quality of Apollo’s services and the maintenance of high professional standards, Apollo has developed an excellent reputation with purchasers and prospective purchasers of its investigative and security services. (Id., ¶28) As a result of offering these services, as well as its consistent and long-standing use, promotion and advertising of these services in association with the Registered Marks, the marks have acquired significant good will and are of great value to Apollo. (Id., ¶39)

#### D. Applicant and its Registration Application

On or about April 5, 2013, the applicant Apollo Investigations, Inc. (“Apollo Investigations” or “the Applicant”) filed an application with the USPTO, seeking to register the mark, “Apollo Investigations, Inc.,” for, among other things, private investigations, in International Class 045: Private investigation (the “Application”). In its application, Applicant claimed that it first used the mark as early as September 30, 2011, and that it was first used in commerce as early as January 1, 2012. Applicant states that it has offices in Manassas, Virginia and in Bethesda, Maryland and apparently operates throughout the Washington, D.C. metropolitan area (Youlen Decl., ¶¶18, 31).

In the declaration of its president, Applicant describes a relatively limited scope of services, consisting of: private investigator services to individuals, with a primary focus on matrimonial investigations and surveillance; service of process; and providing an officer for a



private police corporation.<sup>6</sup> (*Id.*, ¶6, 7) However, according to the Applicant’s website (attached as Exhibit C to the Youlen Decl.), the Applicant offers a much wider array of services to the general public, including: (a) Asset & Liability Search; (b) Asset Research; (c) Background Investigations; (d) Civil Process Server; (e) Computer Forensics; (f) Criminal Investigations; (g) Family Law; (h) Fingerprinting; (i) GPS Tracking; (j) Matrimonial; (k) Missing Persons; (l) Surveillance; and (m) Workplace Violence. Nothing in the company’s website (or in the Youlen Decl.) indicates that Applicant limits its operations geographically to the Washington, D.C. metropolitan area.

Applicant’s own submission evidences the inter-related nature between security and investigative services. In addition to the long list of services advertised on its website – which blur the line between investigatory and security services – and the fact that the Applicant offers security services to at least one client (while asserting that such services are not marketed), Applicant’s own website touts the fact that, “Each security package is individually tailored to provide maximum protection against the identified risk for people and or [sic] their property.” *See* Youlen Decl., Ex. C, pg. 2 (“Design and Specification”). On the website’s “About Us” page, Applicant states that the company “employs people from very diverse backgrounds to include law enforcement, security, computer forensic, and surveillance experts.” (*Id.*, page 4).

#### E. Similarity of the Parties’ Services

While Apollo offers a broader array of services than those apparently offered by Applicant, there is significant overlap in the services offered by both parties. For example, both Applicant and Opposer offer a wide array of investigative services, and both offer to provide tailored security packages to their customers. Moreover, there is a strong correlation in the public perception as between investigative and security services. As stated by Mr. Crowley,

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<sup>6</sup> Applicant maintains that the private security service is not “a marketed service.” (*Id.*, ¶7)

Apollo's President, "Based on my many years in this business, I understand that purchasers of investigative services and security services perceive a relationship between the two and often look to the same service provider to provide both." (Id., ¶30)

Apollo provides security services and investigative services to many of its customers, and there is a substantial relationship between these two services. For example, customers will often come to Apollo seeking security services and then, when there has been an internal breach of security, theft or other incident requiring investigation, they will ask Apollo to perform those investigative services. (Id., ¶31)

Apollo contends that there is a substantial likelihood of confusion between the Registered Marks and the mark "Apollo Investigations, Inc." for which Applicant seeks registration. Indeed, the use of the mark "Apollo Investigations, Inc." by Applicant will likely lead Apollo's existing customers, as well as prospective customers, to believe that Apollo is offering investigative services using that mark. (Id., ¶¶33, 34)

#### F. Similarity of the Parties' Marks

The predominant feature of both Apollo's Registered Marks and Opposer's proposed mark is the word "Apollo." In this respect, the marks are identical. As discussed *supra*, the Registered Marks are well-recognized and known by those seeking to purchase investigative and security services due to Apollo's long-standing use of those Registered Marks in its marketing, its advertising and promotional efforts and its offering of services to the public throughout the country, among other things. (Id., ¶8) Both marks prominently feature the word "Apollo"; security and investigative services are related; Apollo provides both such services; and the words, "International" and "Investigations" (though disclaimed) are similar in appearance. (Id., ¶33)

#### G. Overlap in the Parties' Channels of Trade and Target Market

First, with respect to investigative services, both Apollo and Opposer are providing the same services, i.e., investigative services. Second, Apollo also offers security services which are closely related to investigative services. Thus, for the same reasons described above (see Section E., *supra*), because of the similarity and related nature of security and investigative services, both types of services are advertised and sold through the same channels of trade to the same and overlapping perspective purchasers of such services. (*Id.*, ¶32)

#### H. Apollo's Efforts to Protect the Registered Marks

Apollo has acted diligently and consistently to protect its mark from use by others and has sought to avoid confusion in the marketplace through such efforts. These efforts have included, among other things, demanding that other persons and entities cease and desist from infringing Apollo's Registered Marks and/or from using confusingly similar marks without Apollo's permission. (*Id.*, ¶35)

On April 2, 2013, through counsel, Apollo sent a cease and desist letter to the applicant, Apollo Investigations, Inc., requesting that the Applicant cease and desist in any further usage of Apollo's trademarked name and marks. (*Id.*, ¶36; *see* letter dated April 2, 2013 and attached to First Crowley Decl. as Exhibit W)

Previously, Apollo had caused similar cease and desist letters to be sent to each of the following entities: (i) Apollo Citiwide Security, Inc., Eastchester, New York, on February 20, 2009; (ii) Apollo Security Consultant & Private Investigations, San Antonio, Texas on August 8, 2012; (iii) Eric J. Rousseau, Apollo Consulting Group, LLC, Germantown, Maryland on September 11, 2012; and (iv) Thomas B. Thompson, Apollo Consulting Group, LLC,

Germantown, Maryland on August 8, 2012. (*Id.*, ¶37; *see* letters attached to First Crowley Decl. as Exhibits X, Y, Z and AA).

Apollo has also brought suit to protect its Registered Marks. In October 2012, Apollo brought suit in Norfolk Superior Court in Massachusetts against Apollo Consulting Group, LLC, of Germantown, Maryland. In the complaint in that case, Apollo alleged that defendant had infringed its trademark by offering various services consisting of security services, investigations and security consulting. (*Id.*, ¶38; *see* Complaint attached to First Crowley Decl. as Exhibit BB) A default judgment and permanent injunction was subsequently entered by the Court. (*Id.*)

## **V. ARGUMENT**

Section 2(d) of the Lanham Act prohibits the registration of marks that consist of or comprise a mark that “so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive . . . .” 15 U.S.C. § 1052(d). Based upon the facts set forth above, it is apparent that confusion, mistake or deception would be likely, and that Apollo would be damaged if registration of Applicant’s mark were permitted in connection with the services identified in the application at issue. Therefore, Opposition No. 91212820 should be sustained and registration of the Apollo Investigations’ mark in connection with these services should be rejected.

### **A. Apollo Has Standing to Oppose Registration of Applicant’s Mark and Has Priority of Use.**

Apollo plainly has standing to oppose the application at issue and its priority of use is established. For an opposer to have standing, it must have a “real interest” in the outcome of the proceeding and a “reasonable” belief that its rights would be damaged if the mark at issue

were registered. *Ritchie v. Simpson*, 170 F.3d 1092, 1095, 50 U.S.P.Q.2d 1023, 1026 (Fed. Cir. 1999). Apollo has strong, prior rights in the Registered Marks, which were first used in commerce in 1990; and its pleaded registrations are a matter of record. *See* First Crowley Decl., Exhibits A - F. In view of these registrations, Apollo has established priority for the services at issue herein. *See King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 U.S.P.Q. 108 (C.C.P.A. 1974).

**B. Applicant's Proposed Trademark Is Likely to Cause Confusion with Apollo's Registered Marks.**

Whether a likelihood of confusion exists is a question of law, determined on a case-specific basis by applying the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973). However, not all of the *du Pont* factors are relevant or given equal weight in the analysis, and any one factor may be dominant in a given case. *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 1315, 65 U.S.P.Q.2d 1201, 1204 (Fed. Cir. 2003); *see In re du Pont, supra*, 476 F.2d at 1361-62, 177 U.S.P.Q. at 567-68. "The basic principle in determining confusion between marks is that marks must be compared in their entireties and must be considered in connection with the particular goods or services for which they are used." *In re National Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 750-51 (Fed. Cir. 1985).

In the present case, the following factors are the most relevant and are supported by the evidence of record: (1) the relatedness of the services described in the Application to services associated with the Registered Marks; (2) the similarity of the trade channels and target markets; (3) the similarity of the marks; and (4) the extent of potential confusion.

1. *The Services Identified In the Application Include Both Services Offered by the Opposer and Closely Related Services.*

When considering the similarities between the parties' goods or services, the issue is not whether purchasers would confuse the goods or services, but rather whether there is a likelihood of confusion as to their source. *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993), and cases cited therein; *In re Rexel Inc.*, 223 U.S.P.Q. 830 (T.T.A.B. 1984). Here, the identification of services in the application at issue is identical or closely related to the goods for which Apollo's marks are registered. Apollo uses the Registered Marks in connection with its security and investigative services. It is clear that, if allowed, the Applicant will proceed to use its purported mark in connection with offering, at minimum, investigative services. Thus, there is clearly a likelihood of confusion. *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 648 F.2d 1335, 1336, 209 U.S.P.Q. 986, 988 (C.C.P.A. 1981) (likelihood of confusion must be found if the public is likely to believe that the opposer has expanded its use of the mark, directly or under license, with respect to *any item* that comes within the identification of services in the application opposed).

The services offered do not have to be identical or even competitive in order to result in a likelihood of confusion. Rather, it is sufficient that the goods or services of the applicant and the registrant are so related that the circumstances surrounding their marketing are such that they are likely to be encountered by the same persons under circumstances that would give rise to the mistaken belief that they originate from the same source. *See, e.g., On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000) (ON-LINE TODAY for Internet connection services held likely to be confused with ONLINE TODAY for Internet content); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984) (MARTIN'S for wheat bran and honey bread held likely to be confused with MARTIN'S

for cheese); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (CONFIRM for a buffered solution equilibrated to yield predetermined dissolved gas values in a blood gas analyzer held likely to be confused with CONFIRMCELLS for diagnostic blood reagents for laboratory use); *In re Jeep Corp.*, 222 USPQ 333 (TTAB 1984) (LAREDO for land vehicles and structural parts therefor held likely to be confused with LAREDO for pneumatic tires).

The relevant services on which the parties use or seek to use their marks need not be identical or directly competitive to prove a likelihood of confusion. Instead, they need only be related in the sense that consumers encountering the marks would have the mistaken belief that the services emanate from the same source. Apollo submits that the services to be offered by the Applicant and the services covered by the Registered Marks are sufficiently related such that confusion is likely if not inevitable. Given the identity or at minimum, the similarity of the services claimed in the Application with the services offered by Apollo and associated with its Registered Marks, this factor weighs heavily in favor of a finding of likelihood of confusion.

2. *Applicant's Services Are Marketed and Sold in the Same Trade Channels and to the Same Classes of Purchasers as Opposer's Services.*

The evidence of record confirms that Applicant's investigative services are sold in the same channels of trade as the same and similar services offered by Apollo. *See Crowley Decl.*, ¶32. Both parties market their services to the same potential customers, namely, purchasers of investigative services. Moreover, to the extent that the parties' services are identical or otherwise closely related (they are) and there are no limitations in either the asserted registrations or the applications at issue, the Board must presume that they are to be marketed and sold in the same channels of trade and to the same classes of purchasers. *See In re Smith and Mehaffey*, 31 U.S.P.Q.2d 1531, 1532 (T.T.A.B. 1994); *Brown Shoe Co., Inc. v. Robbins*,

90 U.S.P.Q.2d 1752, 1754-55 (T.T.A.B. 2009). Thus, this factor, too, weighs heavily in favor of a finding that there is a likelihood of confusion.

3. *The Applicant's Proposed Mark Is Virtually Identical to Apollo's Registered Trademarks and Creates the Same Commercial Impression as Registrant's Marks.*

To gauge their similarity, the marks are compared in terms of their appearance, sound, connotation and commercial impression. *In re E. I. du Pont*, 476 F.2d at 1361, 177 U.S.P.Q. at 567 (C.C.P.A. 1973); *Recot Inc. v. Becton*, 214 F.3d at 1329-30, 54 U.S.P.Q.2d at 1899 (Fed. Cir. 2000). A finding of similarity in any one of these aspects is sufficient to support a determination that there is a likelihood of confusion. *In re White Swan, Ltd.*, 8 U.S.P.Q.2d 1534, 1535 (T.T.A.B. 1988).

The ultimate question is not whether people will confuse the marks, but whether the marks will confuse people into believing that the services such marks identify have a common origin. *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 201, 175 U.S.P.Q. 558, 558 (C.C.P.A. 1972). Here, the marks at issue are sufficiently similar in sight, sound and meaning to cause confusion. Among other things: (i) both marks prominently feature the word "Apollo;" (ii) security and investigative services are related; (iii) Apollo provides both such services; and (iv) the words, "International" and "Investigations" are similar in appearance. Thus, Applicant's proposed mark is similar in sight, sound and meaning to Apollo's Registered Marks.

The most prominent feature of both the Registered Marks and the Applicant's proposed mark is the word "APOLLO." As the first word of the mark, APOLLO is the dominant part of the proposed mark, making the use of such mark even more likely to cause confusion with the Opposer's Marks. *See, e.g., Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 876, 23 U.S.P.Q.2d 1698, 1700 (Fed. Cir. 1992) (holding CENTURY LIFE OF AMERICA was



likely to cause confusion with CENTURY 21 and noting that when consumers encounter the marks, they first notice the identical lead word); *Presto Products Inc. v. Nice-Pak Products Inc.*, 9 U.S.P.Q.2d 1895, 1897 (T.T.A.B. 1988) (finding that purchasers would likely be confused between KIDWIPES and KID STUFF towelettes in part because “both start with the term ‘KID’ (a matter of some importance since it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered)”). *See also Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 1571, 218 U.S.P.Q. 390, 395 (Fed. Cir. 1983) (noting there were differences between applicant’s GIANT HAMBURGERS mark and opposer’s GIANT and GIANT FOOD marks, but greater force and effect must be given to the dominant GIANT portion of the mark such that similarities in appearance, sound, and impression outweighed dissimilarities).

Further, for both the Registered Marks and the Applicant’s proposed mark, the remaining words in the marks – other than “Apollo” – are disclaimed. Thus, Apollo is not only the dominant feature of both parties’ marks, it is the aspect for which each claims exclusive use.

Both the Federal Circuit and the Board have regularly found confusing similarity between marks that share a common or identical word or syllable. *See, e.g., Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 U.S.P.Q.2d 1689 (Fed. Cir. 2005) (finding likelihood of confusion between VEUVE ROYALE and VEUVE CLICQUOT); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 1341, 71 U.S.P.Q.2d 1944, 1945 (Fed. Cir. 2004) (affirming likelihood of confusion finding between JOSE GASPAR GOLD for tequila and GASPAR’S ALE for beer); *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d at 1378, 63 U.S.P.Q.2d at 1311 (Fed. Cir. 2002) (holding POWERWAVE mark for amplifiers similar in sound and connotation to ACOUSTIC WAVE for loudspeaker systems and WAVE

for radios and stereos); *Nina Ricci*, 889 F.2d at 1073-74, 12 U.S.P.Q.2d at 1903-04 (holding VITTORIO RICCI confusingly similar to NINA RICCI); *Colgate-Palmolive Co. v. Warner-Lambert Co.*, 184 U.S.P.Q. 380, 383 (T.T.A.B. 1974) (finding reasonable likelihood purchasers of ULTRA-DENT denture cleanser tabs would mistakenly believe product emanated from producer of ULTRA BRITE toothpaste). The present case is no different. Apollo's proposed mark is similar in overall sight, sound and meaning to the Registered Marks.

4. *The Extent Of Potential Confusion Is Great.*

Because investigative services are widely available consumer services, the extent of potential confusion is high. *See Message in a Bottle, Inc. v. Cangiarella*, Opp. No. 91162780, 2010 WL 2604981, at \*10 (T.T.A.B. Jun. 15, 2010) (finding that the extent of potential confusion is high because the goods and services are offered to the general public); *In re Aladdin's Eatery, Inc.*, Se. No. 76020517, 2006 WL 402558, at \*7 (T.T.A.B. Feb. 7, 2006) ("The potential for confusion from the use of virtually identical marks in connection with legally identical services that could be offered to the general public across the United States is substantial.").

As the newcomer, Applicant has the opportunity of avoiding confusion. *See In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 U.S.P.Q.2d 1025 (Fed. Cir. 1988). Given the probability of such confusion here, Applicant is particularly obligated to do so. Accordingly, this factor weighs heavily in favor of a finding of likelihood of confusion.

5. *Analysis of the Relevant Factors Establishes That Confusion Is Likely.*

In sum, the evaluation of all the evidence of record demonstrates the existence of a likelihood of confusion between Apollo's marks and the Applicant's proposed mark, when that mark is used in connection with investigative (or security) services. Given the strength of the

Registered Marks and the fact that the services are identical in part and related as to the remaining part, and are sold in the same channels of trade, Applicant's registration of the closely similar proposed mark is likely to cause confusion with Apollo's Registered Marks. As stated by the Federal Circuit, "there is... no excuse for even approaching the well-known trademark of a competitor." *Specialty Brands*, 748 F.2d at 676, 223 U.S.P.Q. at 1285 (Fed. Cir. 1984). All doubt as to whether confusion, mistake, or deception is likely must be resolved against the newcomer, especially where the established mark is well-established and applied to a service purchased by a wide class of potential consumers. *Id.*; *see also Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 U.S.P.Q.2d 1001, 1003 (Fed. Cir. 2002); *Broderick & Bascom Rope Co. v. Goodyear Tire & Rubber Co.*, 531 F.2d 1068, 1070, 189 U.S.P.Q. 412, 413 (C.C.P.A. 1976). In short, a consumer familiar with Apollo's investigative and/or security services, who then encounters the Applicant's proposed mark associated with closely related if not identical services, are likely to be confused as to the source of the services being offered.

**C. Applicant's Alleged Mark Is a Trade Name Only, Not Connected with the Offering of Services.**

It is well settled that a term used only as a corporate or trade name is not registerable. *T.M.E.P.*, §1202.01 ("The Trademark Act does not provide for registration of trade names."). *See also, Martahus v. Video Duplication Services, Inc.*, 3 F.3d 417, 27 U.S.P.Q.2d 1846 (Fed. Cir. 1993) ("A trade name which also has significance as either a trademark or a service mark may be registered, whereas a trade name lacking any such significance may not."). *See e.g. In re Unclaimed Salvage & Freight Company, Inc.*, 192 U.S.P.Q. 165, 1976 WL-21118 (T.T.A.B. 1976) (manner of use of "Unclaimed Salvage & Freight Co." held to constitute use only as a non-registerable business or trade name, not as a mark to distinguish services rendered); *In re*

*Supply Guys, Inc.*, 86 U.S.P.Q.2d 1488, 2008 WL 618622 (T.T.A.B. 2008) (Use of "Leading Edge Toners" only in a "ship from" return address on shipping labels was use as a trade name use, not as a trademark to identify the source of the goods inside the package. Similarly, use of the designation as part of an Internet address on a Web page was not use as a trademark for goods sold on the Web site.). Here, the Applicant seeks to register its corporate name, Apollo Investigations, Inc., which is a trade name, rather than an actual mark used to identify services. This is made absolutely clear by the specimen submitted and relied on by Applicant in connection with its application for registration – that specimen is consistent with corporate letterhead identifying the Applicant's corporate name and its contact information, but not offering services. See Exhibit "A" to Apollo's Notice of Opposition and the USPTO application for Applicant's proposed mark. The application should be refused for this reason as well.

## **VI. CONCLUSION**

For 25 years prior to Applicant's filing of the application at issue, Apollo has been building its mark as a means to promote its expanding line of investigation and security services. Allowing Applicant to register its proposed mark for these same and similar services would create a likelihood of confusion, erode the distinctiveness of the Apollo's marks and injure both Apollo and the consuming public. Accordingly, Apollo respectfully requests the Board to sustain its Opposition and refuse registration of Applicant's application.

Respectfully submitted,  
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By its attorneys,

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**CERTIFICATE OF MAILING**

I hereby certify that on this 22<sup>nd</sup> day of May, 2015, a true copy of the foregoing was served by first class mail, postage prepaid, and via e-mail on:

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/s/ Jon C. Cowen  
\_\_\_\_\_  
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## **APPENDIX A**

### **IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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**Apollo Security International, Inc.**

**Opposer**

**v.**

**Apollo Investigations, Inc.**

**Applicant.**

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**Opposition No. 91212820  
Serial No. 85897079**

**In re Application Serial No.: 85897079**

**For the Mark: “Apollo Investigations, Inc.”**

**Filed: April 5, 2013**

**Published in the Trademark  
Official Gazette on: September 24, 2013**

#### **EVIDENTIARY OBJECTIONS OF OPPOSER APOLLO SECURITY INTERNATIONAL, INC.**

Opposer Apollo Security International, Inc. (“Apollo” or “Opposer”) hereby submits its objections to the testimony and documents that are sought to be introduced in this proceeding by the applicant, Apollo Investigations, Inc. (“Apollo Investigations” or “Applicant”). The sole evidence offered by Applicant consists of an unsworn declaration from its president, Michael Youlen, filed on January 7, 2015 (“Youlen Declaration”). Because the unsworn declaration is not in compliance with the Trademark Trial and Appeal Board Rules of Procedure and with the

federal Rules of Civil Procedure and does not constitute admissible evidence, the Youlen Declaration should be stricken in its entirety. In the alternative, Apollo objects to the admission of certain testimony and documents attached as exhibits to the Youlen Declaration, as follows:

A. Matters on which Declarant Has No Personal Knowledge.

The Youlen Declaration sets forth numerous hearsay statements as to which the declarant has no personal knowledge or information. In particular, in paragraphs 12 and 13, the declarant testifies that the Opposer is not licensed in Virginia. However, nothing in the declaration establishes that Mr. Youlen has any personal knowledge about the Opposer's actual operations in Virginia. Accordingly, this testimony should be stricken or disregarded. Mr. Youlen asserts further that, if the Opposer is operating in Virginia, it would be doing so "illegally." (Youlen Declaration, ¶13) The declarant has no basis for stating a legal opinion; and in any event, the assertion is irrelevant and defamatory.

Mr. Youlen next declares that Apollo does not provide private investigator services or surveillance for individuals, *id.* at ¶14; that Apollo "does not offer its investigations to the general public," *id.* at ¶15; that Apollo does not "publicly market investigations," *id.* at ¶16; and that Apollo "only looks into thefts of assets for which they are already providing security." *Id.*<sup>7</sup> Once again, Applicant lacks any personal knowledge or information concerning the actual operations and scope of services offered by Apollo. To the extent the testimony is based upon a review of other testimony or evidence submitted by Opposer, the testimony is improper and ought to be disregarded.

B. The Applicant's Statements Concerning the Likelihood of Confusion Are Entirely Speculative and Should Be Stricken or Disregarded.

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<sup>7</sup> These unfounded assertions are repeated in paragraph 24 of the Youlen Declaration in the context of the likelihood of confusion standard, and should likewise be disregarded or stricken.

In paragraph 24 of the Youlen Declaration, the declarant asserts that there is “no likelihood of confusion” between the services offered by the Applicant and those offered by the Opposer. Applicant makes a similar assertion in paragraph 25. This testimony is not based on any objective analysis of the marketplace in general, or of a particular class of consumers of investigative services. Mr. Youlen offers no support for his conclusory assertions, because he has none. This testimony constitutes rank speculation and should be stricken or disregarded.

C. The Internet Print-outs Attached to the Youlen Declaration as Exhibit “E”  
Are Not Properly Authenticated and Should Be Stricken.

Attached to the Youlen Declaration as Exhibit “E” are pages apparently consisting of print-outs from various unnamed websites. Nothing in the Youlen Declaration indicates how these webpages were located, whether they were verified, or even whether the print-outs constitute a true and accurate copy of the pages which were selectively attached to the declaration. The Applicant has made no effort to properly verify or authenticate the documents attached to the Youlen Declaration as Exhibit “E,” in violation of Federal Rule of Evidence 901(a): “To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Because the Applicant has failed to do so, the documents attached to the declaration as Exhibit “E” should be stricken.

D. Applicant Failed to Fully Disclose Mr. Youlen’s Testimony Concerning  
the Opposer in its Pre-trial Disclosures.

In its Pre-Trial Disclosures, filed on or about October 24, 2014, the Applicant set forth the scope of the testimony which it intended to offer from its president, Michael Youlen. With limited exception, the testimony identified in the Pre-Trial Disclosures relates solely to the Applicant’s business, services and customers. The full extent of the testimony identified in the Pre-trial disclosure concerning the Opposer consists of the following: the purported lack of



confusion and the lack of similarity between the Applicant's and the Opposer's marks and services; and documents concerning the nature and purported geographic reach of the services offered by the Applicant and the Opposer.

However, in the Youlen Declaration, the Applicant has offered testimony on a broader scope of matters than were disclosed concerning the Opposer, including the following: (i) the unfounded and speculative accusation that the Opposer allegedly made several phone inquiries to the Applicant, purportedly to establish evidence of confusion in the marketplace (Youlen Declaration, ¶¶27, 28); and (ii) that there are "other firms using the term Apollo" that the Opposer has never "molested." (*Id.*, ¶30) Because these matters were never disclosed in the Applicant's Pre-trial Disclosures, they should be stricken from the record. *See* 37 C.F.R. § 2.121(e) (requiring general summary or list of subjects on which the witness is expected to testify, and a general summary or list of the types of documents and things which may be introduced as exhibits during the testimony of the witness); 37 C.F.R. § 2.123(e)(3) (opposing party may move to strike the testimony of a witness for lack of proper or adequate pretrial disclosure; or may seek exclusion of that portion of the testimony that was not adequately disclosed).

Respectfully submitted,

**APOLLO SECURITY INTERNATIONAL,  
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**CERTIFICATE OF MAILING**

I hereby certify that on this 22<sup>nd</sup> day of May, 2015, a true copy of the foregoing was served by first class mail, postage prepaid, and via e-mail on:

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/s/ Jon C. Cowen  
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